STATE OF MICHIGAN

IN THE SUPREME COURT

APPEAL FROM THE COURT OF APPEALS

Judges: Richard A. Bandstra, William B. Murphy, and Richard Allen Griffin

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PEOPLE OF THE STATE OF MICHIGAN,
Plaintiff-Appellee,

-vs-

ROBERT CHARLES DELINE,
Defendant-Appellant.

Supreme Court
No. 123079

Court of Appeals
No. 237307

Gratiot Circuit Court
Nos. 01-4178-FH; 01-4179-FH

BRIEF OF THE PROSECUTING ATTORNEYS ASSOCIATION OF MICHIGAN IN SUPPORT OF THE STATE OF MICHIGAN

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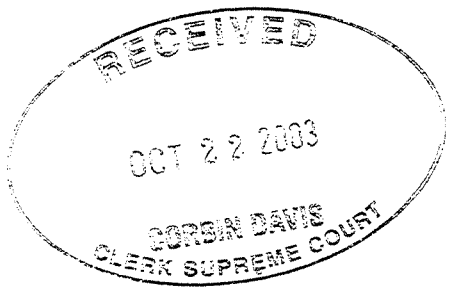

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Statement of Basis of Jurisdiction

Amicus Curiae accepts Plaintiff-Appellant's Statement of Basis of Jurisdiction.

Statement of Question Presented

The Legislature presumptively knows the consequences of using or omitting language when it enacts laws. If legislators had intended OV 19 "interference with justice" to equal "obstruction of justice" and only be scored under rare circumstances, they would not have included this Offense Variable under every crime group. Because the words, phrases, and context of the sentencing guidelines statute clearly support, rather than prohibit, scoring points under OV 19, did the trial court properly assign points?

Trial Court Would Answer:	"Yes."
Court of Appeals Answers:	"No."
Defendant-Appellee Answers:	"No."
Plaintiff-Appellant Answers:	"Yes."
Amicus Curiae Answers:	"Yes."

Statement of Facts

Defendant was convicted by a jury of operating a vehicle while under the influence of intoxicating liquor, third offense, MCL 257.625(1); and driving while his license was suspended, MCL 257.904(1).[1] The trial court departed upward from the sentencing guidelines and sentenced defendant to serve forty to sixty months for his operating under the influence conviction. Defendant appealed his sentence as of right. The Court of Appeals affirmed, deciding the case without oral argument pursuant to MCR 7.214(E).

According to police, defendant drove a motor vehicle in excess of the speed limit. When police stopped the vehicle, field sobriety tests led them to conclude that defendant was intoxicated. Blood drawn from the defendant showed a blood-alcohol level of 0.22, more than double the legal limit for driving, MCL 257.625(1). Defendant and his passenger contended that the passenger, not defendant, had been driving the car. Although defendant occupied the passenger seat when the car was stopped, police saw activity indicating that the two occupants of the vehicle switched positions. Implicit in the jurors' finding of guilt was their belief of the police officers' testimony.

On appeal, defendant claimed that the trial court incorrectly scored offense variable (OV) 19 by determining that defendant had "interfered with or attempted to interfere with the administration of justice" and assigning 10 points as a result of that scoring decision, MCL 777.49(c). The Court of Appeals agreed with defendant's position.

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[1] These facts and those in the following paragraphs are taken from People v Deline, 254 Mich App 595, 596-598; 658 NW2d 164 (2002).

The Court of Appeals found that "interference with" justice is equivalent in meaning to "obstruction of" justice. The panel also found that obstruction of justice "is a broad phrase that captures every willful act of corruption, intimidation, or force *that tends somehow to impair the machinery of the civil or criminal law.*" Further, the panel found that interference with the administration of justice involves an effort to undermine or prohibit the judicial process by which a civil claim or criminal charge is resolved.

The Court of Appeals found that Deline did not engage in any conduct aimed at undermining the judicial process by which the charges against him would be determined. Instead, Deline tried to evade those charges altogether by switching seats with his passenger and refusing an immediate blood-alcohol content test. The Court of Appeals wrote, "If we were to conclude that this evasive and noncooperative behavior justified the imposition of points under OV 19, that variable would apply in almost every criminal case. Defendants almost always seek to hide their criminal behavior and rarely step forward to offer evidence proving their guilt." Deline, supra, at 597-598.

The Court of Appeals found that the imposition of 10 points against defendant under OV 19 was error. However, in light of the trial court's reasons for exceeding the guidelines as well as the panel's conclusion that a significant departure upward was appropriate, the Court concluded, "that the slight OV 19 error was harmless" and did not remand for resentencing. Deline, supra, at 598.

Instead, the Court of Appeals held, "We do not find that the sentencing departure here was in error. As pointed out by the prosecutor, although defendant's history of misdemeanors and felonies was partially accounted for in the scoring of prior record variables, that scoring did not account for the number or extent of those offenses. Other

factors not accounted for in the guidelines scoring indicate that defendant is unwilling or unable to accept driving offenses by him. For example, he was on probation for drunken driving at the time of his offense, he had a blood-alcohol level far in excess of the legal limit, he was driving although his license had been suspended, and he has been sentenced to jail for numerous drunken driving offenses." Deline, supra, at 598-599.

In an Order dated July 3, 2003, the Michigan Supreme Court granted the prosecutor's application for leave to appeal from the December 27, 2002 judgment of the Court of Appeals. People v Deline, 468 Mich 942; 666 NW2d 663 (2003). In another Order, also dated July 3, 2003, the Supreme Court denied the defendant's delayed application for leave to appeal because the Justices were "not persuaded that the question presented should be reviewed by this Court." People v Deline, 468 Mich 944; 666 NW2d 663 (2003).

Argument

The Legislature presumptively knows the consequences of using or omitting language when it enacts laws. If legislators had intended OV 19 "interference with justice" to equal "obstruction of justice" and only be scored under rare circumstances, they would not have included this Offense Variable under every crime group. Because the words, phrases, and context of the sentencing guidelines statute clearly support, rather than prohibit, scoring points under OV 19, the trial court properly assigned points.

Standard of Review: This case involves a question of statutory interpretation, which this Court reviews de novo. People v Krueger, 466 Mich 50, 53; 643 NW2d 223 (2002).

Analysis: The requirements for scoring offense variable 19 are listed in MCL 777. 49:

> Offense variable 19 is threat to the security of a penal institution or court or interference with the administration of justice. Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offender by his or her conduct threatened the security of a penal institution or court.....25 points
> (b) The offender used force or the threat of force against another person or the property of another person to interfere with or attempt to interfere with the administration of justice.....15 points
> (c) The offender otherwise interfered with or attempted to interfere with the administration of justice.....10 points
> (d) The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice.....0 points

The Court of Appeals' Deline decision is Obiter Dictum

In People v Deline, 254 Mich App 595, 597-598; 658 NW2d 164 (2002), the Court of Appeals considered the scoring of OV 19:

> Defendant here did not engage in any conduct aimed at undermining the judicial process by which the charges against him would

> be determined. Instead, he tried to evade those charges altogether by switching seats with his passenger and refusing an immediate blood-alcohol content test. If we were to conclude that this evasive and noncooperative behavior justified the imposition of points under OV 19, that variable would apply in almost every criminal case. Defendants almost always seek to hide their criminal behavior and rarely step forward to offer evidence proving their guilt.
>
> Accordingly, the imposition of ten sentencing points against defendant under OV 19 was error. As defendant himself admits, the guidelines sentencing range that applies in the absence of those points has an upper limit only one month lower than that employed by the trial court. In light of the trial court's reasons for exceeding the guidelines as well as our conclusion that a significant departure upward was appropriate here (see discussion below), we conclude that the slight OV 19 error was harmless and do not remand for resentencing. MCR 2.613(A).

The Deline dictum regarding OV 19 can be analogized to the Court of Appeals' analysis of OV 11, which the Michigan Supreme Court found to be dictum in People v Mutchie, 468 Mich 50, 52; 658 NW2d 154, 156 (2003). In its Mutchie[2] opinion, the Court of Appeals stated:

> After reviewing the record, we conclude that the scoring issue is moot because, even if there were error, resentencing is not warranted given the trial court's remarks that it would have imposed the same sentences regardless of the scoring of OV 11. [251 Mich App at 274.]

Similarly, in Deline, supra, at 598, the Court of Appeals concluded, "that the slight OV 19 error was harmless." Obiter dictum is defined as a judicial comment made during the course of delivering a judicial opinion, but one that is unnecessary to the decision in the case and therefore not precedential (though it may be considered persuasive). People v Schaub, 254 Mich App 110, 118; 656 NW2d 824 (2002). The Deline Court's comments regarding OV 19 were unnecessary to its decision in the case

[2] People v Mutchie, 251 Mich App 273; 650 NW2d 733 (2002).

because the panel found harmless error under MCR 2.613(A). Deline, supra, at 598. Thus, Deline is not controlling precedent regarding the scoring of OV 19.

In People v Cook, 254 Mich App 635; 658 NW2d 184 (2003), a different panel considered OV 19 in an opinion published only seven days after the Deline decision was released. In Cook, supra, at 641, the panel held that the trial court did not err in scoring ten points under OV 19 for an assault conviction where defendant had run away from the police. Amicus submits that Deline is unpersuasive dictum. Cook is controlling, and this Court should vacate that portion of the appellate decision regarding OV 19, and affirm the trial court's scoring of 10 points for that offense variable.

Deline's interpretation of MCL 777.49 violates statutory construction

The paramount rule of statutory interpretation is to give effect to the intent of the Legislature as expressed by the words of the statute.[3] The statutory construction analysis begins by consulting the specific statutory language at issue.[4] If the statute's language is clear and unambiguous, then the court enforces the statute as written.[5] Where ambiguity exists, courts seek to effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished.[6]

Not only is the Deline panel's interpretation of MCL 777.49 *dictum*, it was incorrectly decided. The Deline court's interpretation of MCL 777.49 violates the tenets of statutory construction. First, the common, ordinary meaning of the words in the phrase "administration of justice" does not limit the scoring of OV 19 to a court proceeding. While the phrase "administration of justice" is not statutorily defined, this

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[3] Omelenchuk v The City of Warren, 466 Mich 524, 528; 647 NW2d 493 (2002).
[4] Id.; People v Spanke, 254 Mich App 642, 646; 658 NW2d 504 (2003).
[5] Id.
[6] Spanke, supra.

Court should look to the common dictionary definition to discern its generally accepted meaning.[7] Webster's New World Dictionary, Third College Edition (1988) defines ***administration*** as:

> "1 the act of administering; management; specif., the management of governmental or institutional affairs; ...4 the administering (*of* punishment, medicine, a sacrament, an oath, etc.)"

The same dictionary defines ***justice*** as:

> "1 the quality of being righteous; rectitude 2 impartiality; fairness 3 the quality of being right or correct 4 sound reason, rightfulness, validity 5 reward or penalty as deserved; just deserts 6 a) **the use of authority and power to uphold what is right, just, or lawful** b) [J-] the personification of this, usually a blindfolded goddess holding scales and a sword 7 administration of law; procedure of a law court 8 a) judge (n.1) b) justice of the peace—bring to justice—to cause (wrongdoer) to be tried in the court and duly punished..."[8]

Michigan courts have applied the words in the phrase "interference with the *administration* of *justice*" to a wide range of factual situations, not just to court proceedings. Police officers administer justice.[9] They also administer polygraphs[10] and Breathalyzer tests.[11] They execute the law.[12]

Defendant cites cases that interpret the phrase "obstruction of justice." Those cases appear to limit common-law obstruction of justice charges to acts occurring in court proceedings.[13] But, the Legislature chose the phrase "*interference* with the *administration of justice*," not obstructing, or the obstruction of justice. The Legislature

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[7] Id.
[8] Emphasis added by this writer.
[9] Hewitt v White, 78 Mich 117, 119; 43 NW 1043 (1889). "Most of the sheriff's fees fixed by statute relate to services in connection with the administration of civil and criminal justice, and the keeping and control of prisoners."
[10] People v Ray, 431 Mich 260, 263; 430 NW2d 626 (1998).
[11] People v Rexford, 228 Mich App 371, 374; 579 NW2d 111 (1998).
[12] People v Vasquez, 465 Mich 83, 94; 631 NW2d 711 (2001).
[13] People v Vallance, 216 Mich App 415, 416-417; 548 NW2d 718 (1996).

is presumed to be aware of the consequences of the use or omission of language when it enacts law.[14] If the Legislature had intended to limit the application of OV 19 to acts occurring in court proceedings, then it would have used the phrase "obstruction of justice." It did not do so.[15]

Second, defendant's proposed limitations in scoring OV19 would render a majority of the statute surplusage or nugatory.[16] The introductory description indicates: "Offense variable 19 is threat to the security of a *penal institution or court or interference with the administration of justice.*"[17] The use of the word "or" indicates that the Legislature contemplated conduct that threatens three different entities: penal institutions, courts, or those who administer justice. Limiting the application of the phrase "interference with the administration of justice" to what occurs in court renders the other two protected entities – penal institutions and those who administer justice – surplusage; and negates the Legislature's specific use of the word "court" in defining one of the protected entities.[18]

Third, defendant's proposed limitation on scoring OV 19 ignores the context in which the words and phrase are used.[19] If an ambiguity exists, the Court seeks to

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[14] Spanke, supra; People v 1987 Mercury, 252 Mich App 533, 542-543; 652 NW2d 675 (2002), citing Alcona Co v Wolverine Environmental Prod, Inc, 233 Mich App 238, 247; 590 NW2d 586 (1998).
[15] See Cook, supra.
[16] Omelenchuk, supra at 528.
[17] Id.
[18] Mutchie, supra, citing People v Borchard-Ruhland, 460 Mich 278, 285; 597 NW2d 1 (1999).
[19] Cook, supra, citing Phillip v Jordan, 241 Mich App 17, 22, n 1; 614 NW2d 183 (2000) and Western Michigan Univ Bd of Control v Michigan, 455 Mich 531, 539; 565 NW2d 828 (1997).

effectuate the Legislature's intent through a reasonable construction, considering the purpose of the statute and the object sought to be accomplished.[20]

The court scores points under OV 19 according to the egregiousness of the conduct, and the nature of the entity sought to be protected. The court is instructed to score 25 points for conduct that threatens the security of a *penal institution* or *court*;[21] 15 points if the defendant actually used force or the threat of force against a person or property to interfere with or attempt to interfere with *the administration of justice* or *rendering of emergency services*;[22] and 10 points for *any* interference or attempted interference with the *administration of justice*.[23]

A common sense reading of the statute suggests the Legislature places a higher premium on the security of penal institutions and courts than on the protection of those who administer justice (police). The three entities—penal institutions, courts, and those who administer justice—are not used interchangeably. Furthermore, the Legislature allows for the scoring of 15 points if a defendant threatens force and interferes with a fourth entity—those who render emergency services.[24] The words used in the context of the statute suggest a desire to protect a variety of people who administer justice, whether they are prison guards, court personnel, police, firefighters or paramedics.

The words, context, and meaning of MCL 777.49 are clear. Courts should score OV 19 in a variety of situations depending on the conduct and the entity involved.

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[20] Id. citing Macomb Co Prosecutor v Murphy, 464 Mich 149, 153; 627 NW2d 247 (2001).
[21] MCL 777.49(a).
[22] MCL 777.49(b).
[23] MCL 777.49(c).
[24] MCL 777.49(b).

Although interpretation of this statute appears to be one of first impression, courts have scored OV 19 in non-court proceedings.

In Edwards,[25] the defendant was convicted of larceny from a person and escape from lawful custody.[26] The defendant, his wife, and co-defendant were en route to the Clare County jail for arraignment on misdemeanor charges. They escaped from the corrections van, confronted the victim in the parking lot, and stole her car.[27] The Court of Appeals upheld the scoring of 10 points for OV 19 because, although the variable reflected to some extent that the defendant was in the course of escaping, it focused on the effect on the administration of justice.[28]

In People v Michael Holman,[29] the panel upheld the scoring of OV 19 because defendant gave a false name to the police. Although unpublished opinions are not binding precedent, MCR 7.215(C)(1); Watson v Michigan Bureau of State Lottery, 224 Mich App 639, 648; 569 NW2d 878 (1997), Holman is highly persuasive and it clearly responds to the same argument as raised by defendant-appellee Deline. In Holman, at 5, the court wrote:

> "To the extent defendant argues that a person cannot interfere with the 'administration of justice" until after an actual court arraignment, we disagree. This contention appears to be rooted in the theory that interference with the 'administration of justice' refers only to conduct directly aimed at interfering with the courts. We consider it obvious that, despite their markedly different roles, both the courts and the police function as part of the overall criminal administration of justice. We are

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[25] People v Edwards, Court of Appeals No. 233750 (December 20, 2002). Please turn to the back of this brief to see this unpublished per curiam opinion. While Edwards lacks precedential effect, MCR 7.215(C)(1), its reasoning is sound and persuasive.
[26] Id.
[27] Id.
[28] Id.
[29] People v Michael Holman, Court of Appeals No. 236868 (September 16, 2003). Please turn to the back of this brief to see this unpublished per curiam opinion.

> not persuaded by defendant's claim that *People v Deline* requires a different result. In *Deline*, we determined that the defendant was not interfering with the administration of justice when he simply switched positions in a car and refused a blood-alcohol test. The present facts are distinguishable because defendant affirmatively lied to the police. For these reasons, we find that the trial court properly scored defendant ten points under OV 19." (Footnotes omitted.)

The Court of Appeals' Holman decision is not really distinguishable from the facts in Deline because defendant Deline lied to police, telling them that he was not the driver. Thus, defendant Deline interfered with the administration of justice because he affirmatively lied to the police, just as the defendant did in Holman.

In Cook,[30] the defendant was convicted of assault with intent to commit great bodily harm, fleeing and eluding, carrying a concealed weapon, and two counts of felony firearm.[31] Defendant challenged the trial court's scoring of OV 19 in calculating defendant's sentence for assault with intent to do great bodily harm.[32] He conceded that his conduct in evading the police appropriately formed the basis for scoring 10 points for OV 19 for his fleeing and eluding conviction, but argued that the court should not use the same conduct of fleeing police to score OV 19 for both the assault and fleeing and eluding convictions.[33] The court disagreed finding that the Legislature did not expressly prohibit sentencing courts from considering facts pertinent to the calculation of one offense from being used to calculate the guidelines for another offense.[34] The Cook court upheld scoring of 10 points for OV 19 under those circumstances.

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[30] Cook, supra.
[31] Id.
[32] Id.
[33] Id.
[34] Id. The court indicated: "Moreover, where the Legislature has not precluded it, we find that where the crimes involved constitute one continuum of conduct, as here, it is

> In this case, the trial court properly scored 10 points under OV 19 by determining that defendant had "interfered with or attempted to interfere with the administration of justice."[35]

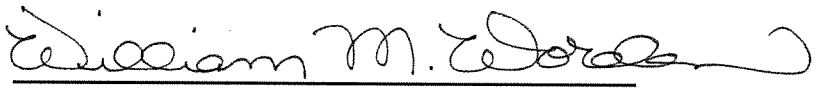
As in Cook, Edwards, and Holman, defendant Deline interfered with the police officers' efforts to administer justice—that is, to bring him to justice.[36] The trial court did not clearly err in scoring 10 points under OV19.

Relief Requested

The People respectfully ask this Honorable Court to **AFFIRM** the Court of Appeals' decision regarding the defendant's convictions and sentence but **VACATE** the portion of the opinion containing *obiter dictum* on the scoring of Offense Variable 19.

JEFFREY L. SAUTER
EATON COUNTY PROSECUTOR

Dated: October 21, 2003



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logical and reasonable to consider the entirety of defendant's conduct in calculating the sentencing guideline range as to each offense.

[35] MCL 777.49(b).

[36] Webster's New World Dictionary, Third College Edition (1988).

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

HAROLD E. EDWARDS, III,

Defendant-Appellant.

UNPUBLISHED
December 20, 2002

No. 233750
Wayne Circuit Court
LC No. 00-009945-02

Before: O'Connell, P.J., and White and B.B. MacKenzie*, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of larceny from a person, MCL 750.357, and escape from lawful custody, MCL 750.197a. The trial court sentenced defendant to five to ten years' imprisonment for the larceny from a person conviction, concurrent to one year for the escape from custody conviction. We affirm.

I

Defendant argues that the trial court erred in refusing to instruct the jury on receiving and concealing stolen property (RCSP) and unlawfully driving away an automobile (UDAA).[1] Defendant asserts that RCSP and UDAA are cognate lesser offenses of carjacking, and that the court must instruct on cognate lesser offenses when the evidence would support a verdict of guilt of the lesser cognate offense. However, in *People v Cornell*, 466 Mich 335, 357, 359; 646 NW2d 127 (2002), decided during the pendency of this case, the Court concluded that MCL 768.32(1) only provides for instructions on necessarily included lesser offenses, not cognate lesser offenses. Thus, under *Cornell, supra,* defendant's claim must fail because *Cornell* abolished the requirement that instructions be given on cognate offenses.

[1] Defendant was charged with carjacking, MCL 750.529a, and escape from lawful custody, MCL 750.197a.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

II

Defendant next argues that he is entitled to resentencing because the trial court exceeded the sentencing guidelines for reasons that were not substantial and compelling, and were already taken into account in calculating the guidelines.

Because the offenses with which defendant was charged occurred after January 1, 1999, the legislative sentencing guidelines apply. MCL 769.34(2); *People v Reynolds*, 240 Mich App 250, 253; 611 NW2d 316 (2000). A court may depart from the legislative guidelines if it has substantial and compelling reasons to do so, and states those reasons on the record. MCL 769.34(3). A court may not depart from the legislative sentencing guidelines based on certain specified factors, including gender, race, ethnicity, national origin, and lack of employment, MCL 769.34(3)(a), nor may it base a departure on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight, MCL 769.34(3)(b).

In reviewing a departure from the legislative guidelines range, the existence of a particular factor is a factual determination this Court reviews for clear error, the determination that the factor is objective and verifiable is reviewed as a matter of law, and the determination that the factors constituted substantial and compelling reasons for departure is reviewed for abuse of discretion. *People v Babcock*, 244 Mich App 64, 75-78; 624 NW2d 479 (2000).

A

At the time of the offense, defendant, his wife, and co-defendant were in route to the Clare County jail. Defendant had been arraigned on a misdemeanor insurance fraud charge and had been unable to post the required bond. The three escaped from the van, confronted the victim in the parking lot of a Jehovah's Witness Kingdom Hall, where she was sitting in her car, and took the victim's car and drove away. Apparently co-defendant confronted the victim and ordered her out of the car, and defendant and his wife joined him. Defendant's sentencing guidelines range was ten to twenty-three months. That he was a fourth habitual offender raised the range to ten to forty-six months. The trial court departed upward, sentencing defendant to five to ten years for the larceny from a person conviction:

* * *

> . . . but the fact remains is that you continue to break the law and I can only imagine how if it was your sister or your grandmother or your brother who were sitting in the parking lot at the Jehovah's Witness, the Kingdom Hall and had three people who had just escaped from custody involved in a carjacking, one your co-defendant, Mr. Davis, threatening her in the manner that he did, I'm sure you would be appalled and would want that person punished.
>
> DEFENDANT EDWARDS: Right.

THE COURT: Perhaps that relative was simply trying to go to church, so having said that, your guidelines are ten to forty-six months. I'm going to go slightly above the guidelines

* * *

I think the guidelines don't take into account at all what the full impact of what happened here is. I think the guidelines at the very best attempt to force all these crimes in a certain kind of category, *but this was done during an escape and I don't think that's effectively dealt with, even though there is some assessment in offense variable nineteen and offense variable six and previous record variable six to some extent, but I think they wholly don't speak to the – the guidelines don't, to what happened in this case.*

The top of your guidelines would be forty-six months. That would be just under four years. It's the sentence of this Court that you be committed to the Michigan Department of Corrections on Count I for no less than five years and no more than ten years. On Count II, it's the sentence of this Court that you serve – it says a one year – two year maximum. It's just a one year, isn't it?

MR. TALON: It's a one year misdemeanor, Judge.

THE COURT: I'll make that correction. You do a year in jail. The times on Count I and II will be concurrent, but consecutive to the sentence you are currently serving. I understand that you were not on parole. You had just been released from parole some months earlier, but certainly consecutive to whatever the offense was that you were being transported for. [Emphasis added.]

B

Prior record variable six is "relationship to the criminal justice system," and provides:

Score prior record variable 6 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:

(a) The offender is a prisoner of the department of corrections or serving a sentence in jail .....20 points

(b) The offender is incarcerated in jail awaiting adjudication or sentencing on a conviction or probation violation.....15 points

(c) The offender is on parole, probation, or delayed sentence status or on bond awaiting adjudication or sentencing for a felony .....10 points

(d) The offender is on probation or delayed sentence status or on bond awaiting adjudication or sentencing for a misdemeanor .....5 points

(e) The offender has no relationship to the criminal justice system .....0 points

* * *

(3) As used in this section:

* * *

(b) "Prisoner of the department of corrections or serving a sentence in jail" includes an individual who is an escapee. [MCL 777.56.]

At sentencing, defendant challenged the scoring of fifteen points under PRV 6, arguing that five points was appropriate because defendant was on bond awaiting adjudication for a misdemeanor at the time of the escape. The trial court disagreed and left the score at fifteen points.

Offense variable nineteen is "threat to the security of a penal institution or court or interference with the administration of justice . . ." MCL 777.49. It provides:

> Score offense variable 19 by determining which of the following apply and by assigning the number of points attributable to the one that has the highest number of points:
>
> (a) The offender by his or her conduct threatened the security of a penal institution or court .....25 points
>
> (b) The offender used force or the threat of force against another person or the property of another person to interfere with, attempt to interfere with, or that results in the interference with the administration of justice or the rendering of emergency services .....15 points
>
> (c) The offender otherwise interfered with or attempted to interfere with the administration of justice .....10 points
>
> (d) The offender did not threaten the security of a penal institution or court or interfere with or attempt to interfere with the administration of justice or the rendering of emergency services by force or threat of force ..... 0 points

At sentencing, defendant objected to this variable being scored at ten points, but the court denied his request and that scoring remained.

C

A court may not base an upward departure on an offense characteristic or offender characteristic already considered in determining the guidelines range unless the court finds, based on facts in the court record, that the characteristic was given inadequate or disproportionate weight. MCL 769.34(3)(b). While the fact that defendant was an escapee was considered to some extent in the guidelines by prior record variable six and offense variable nineteen, the trial court determined that the guidelines accorded that fact inadequate weight, stating that the guidelines did not effectively deal with the fact that "this was done during an escape." While defendant's status as an escapee was a factor in assessing fifteen points under prior record variable six in that he was not regarded as being on bond, because he had not posted

bond, and was, rather, regarded as being incarcerated, the factor did not account for the fact that the offense was committed during the course of an escape. In other words, the variable did not distinguish between the circumstances of a person committing the offense while in the course of escaping, and a person who has previously successfully escaped committing the offense at a later time. The court correctly determined that the fact that defendant was in the course of escaping and the victim was confronted by co-defendant in handcuffs, made the offense more egregious.

Offense variable nineteen also reflected to some extent that defendant was in the course of escaping. However, that variable focused on the effect on the administration of justice, not the aggravation of the larceny inherent in the victim being confronted by persons who appeared to be subject to a heightened level of desperation. Under the circumstances, we are unable to conclude that the trial court's departure violated the statute.

Affirmed.

/s/ Peter D. O'Connell
/s/ Helene N. White
/s/ Barbara B. MacKenzie

STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

MICHAEL HOLMAN,

Defendant-Appellant.

UNPUBLISHED
September 16, 2003

No. 236868
Kent Circuit Court
LC No. 00-001091-FC

Before: Cooper, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Defendant was convicted by a jury of armed robbery, MCL 750.529; possession of a firearm during the commission of a felony, MCL 750.227b; and felon in possession of a firearm, MCL 750.224f. The jury acquitted defendant of the charge of assault with a dangerous weapon, MCL 750.82. The trial court sentenced defendant as a third habitual offender, MCL 769.11, to prison terms of eighteen to fifty years for the armed robbery conviction, two to ten years for the felon in possession of a firearm conviction, and two years for the felony-firearm conviction. The sentences were set to be served consecutively to each other. Defendant appeals as of right. We affirm defendant's convictions, but remand for correction of the judgment of sentence.

I. Facts

Richard and Kathy DeHaan are siblings who worked at a business known as Boston Square Lock and Key. Kathy DeHaan testified that shortly after lunch on January 11, 2000, defendant entered the store, pointed a gun at her, and demanded that she give him the money from the cash register. When defendant asked for more money, Richard DeHaan came out of the back room with his own gun and told defendant to "hold it." Richard DeHaan testified that defendant ran out of the store but then pointed the gun at them through the front store window. At this point, Richard DeHaan fired his weapon at defendant and began chasing him down the street. Richard DeHaan testified that defendant escaped in a light blue Dodge Dynasty. He claimed that he heard defendant discharge his weapon during the chase.

Kathy DeHaan telephoned the police when her brother ran after defendant. The police discovered a vehicle matching the description given by Richard DeHaan in an alley near defendant's home. While setting a perimeter around the vehicle, Officer Phillip Werkema noticed defendant walking away from the area. He testified that defendant matched the height and weight of the description given of the suspect. When Officer Werkema attempted to

approach defendant, he claimed that defendant evaded him by quickly walking between houses. After hearing Officer Werkema's description of defendant over the radio, Officer Kristen Rogers observed defendant come out from between two homes and asked him to stop. She testified that she explained to defendant that he matched the description of a suspected robber in the area and that she was going to detain him. Officer Rogers then placed defendant in handcuffs. She observed that defendant appeared out of breath and nervous but did not discover any weapons on his person. Defendant was not wearing the same clothes that had been described by the DeHaans. The police ultimately sought medical attention for defendant when they discovered he was bleeding from a bullet wound in his shoulder.

Kathy and Richard DeHaan were brought separately to the area where defendant was being detained for a show-up. Only Richard DeHaan was able to identify defendant as the robber at that time. Kathy DeHaan identified defendant as the robber when she testified at trial. She stated that she was now positive of her identification because she heard him speak at the preliminary hearing.

Defendant's mother testified that on the day of the robbery defendant came home shortly after lunch, changed his clothes, and left again. Defendant denied any involvement with the robbery. When questioned by the police at the hospital, defendant claimed that he was shot at a local party store. At trial, however, defendant claimed that his brother shot him accidentally at their home. He testified that he was walking to a friend's house to get a ride to the hospital when he was arrested. Defendant alleged that he lied to the police because he was trying to protect his brother. The prosecution then confronted defendant with a letter, addressed to defendant's brother, that was confiscated from defendant in jail. At the bottom of the letter, defendant wrote: "Study. Keep reading it over. If necessary, add your own details, but it should be straight." Defendant testified that he wrote this letter so that his brother would not commit perjury.

II. Prosecutorial Misconduct

Defendant initially argues that the prosecutor committed misconduct by eliciting testimony that defendant gave false information to the police and used a stolen vehicle. We disagree. Prosecutorial misconduct claims are reviewed case by case, examining any remarks in context, to determine if the defendant received a fair and impartial trial.[1] Because defendant failed to object to this alleged misconduct, our review is limited to plain error affecting his substantial rights.[2] "No error requiring reversal will be found if the prejudicial effect of the prosecutor's comments could have been cured by a timely instruction."[3]

Detective Gregory Griffin testified that defendant provided a false name, address, and other identifying information to police after his arrest. Evidence is considered relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of

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[1] *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001).

[2] *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

[3] *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000).

the action more probable or less probable than it would be without the evidence."[4] Testimony that defendant lied to the police about his identity was relevant to show consciousness of guilt.[5] A prosecutor's good-faith effort to admit evidence does not constitute prosecutorial misconduct.[6]

Defendant has also failed to show that the prosecutor improperly introduced other bad acts evidence in violation of MRE 404(b). In his appellate brief, defendant specifically references Officer Carole Stahl's testimony that the vehicle allegedly used in the armed robbery was reported stolen. Officer Stahl explained at trial that she became involved in the armed robbery investigation, which was outside her normal patrol area, because the vehicle's description matched that of a vehicle recently reported stolen. This testimony was relevant because it explained the circumstances surrounding her discovery of the vehicle.[7] Further, we do not believe that this evidence was so unfairly prejudicial that it caused the jury to convict defendant on an improper or emotional basis.[8] We note that the prosecution never suggested that defendant either stole the vehicle or knew that it was stolen.

III. Jury Instructions

Defendant alleges that his federal and state constitutional rights were violated by the trial court's improper reasonable doubt instruction. This Court generally reviews claims of instructional error de novo.[9] But given defendant's failure to preserve this argument below, our review is again limited to plain error affecting his substantial rights.[10]

It is the trial court's duty to clearly present the case to the jury and instruct them on the applicable law.[11] There is, however, no requirement that a trial court utilize the standard criminal jury instructions.[12] Defendant claims that the reasonable doubt instructions in this case require reversal because they indicated that conviction of the charged crime was appropriate if the jury was "firmly convinced" of defendant's guilt and did not believe there was a "realistic possibility" that he was innocent. This Court recently rejected a similar claim that jury instructions equating proof of guilt beyond a reasonable doubt with proof that "firmly

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[4] MRE 401.

[5] See *People v Sholl,* 453 Mich 730, 740; 556 NW2d 851 (1996) (holding that a defendant's threat against a witness is generally admissible because it can show consciousness of guilt).

[6] *People v Noble,* 238 Mich App 647, 660; 608 NW2d 123 (1999).

[7] See *Sholl, supra* at 741.

[8] *People v Vasher*, 449 Mich 494, 501; 537 NW2d 168 (1995); see also MRE 403.

[9] *People v Hubbard (After Remand)*, 217 Mich App 459, 487; 552 NW2d 493 (1996).

[10] *Carines, supra* at 763-764.

[11] *People v Katt*, 248 Mich App 282, 310; 639 NW2d 815 (2001).

[12] *People v Stephan*, 241 Mich App 482, 495, n 10; 616 NW2d 188 (2000).

convinced" the jury of the defendant's guilt without a "real possibility" of innocence was erroneous.[13] As such, we find no error in the instant reasonable doubt instruction.

Defendant also contends that the trial court erroneously instructed the jury to consider the "background" of a witness. This instruction, defendant asserts, allowed the jury to treat police officers as more credible witnesses and to consider a person's economic and social status. The following are the instructions that the trial court provided to the jury:

> We had some witnesses here who were police officers. You need to know that a police officer isn't entitled to any extra credibility by virtue of the uniform, the badge and the title. But neither is a police officer's credibility to be automatically diminished in your eyes because he or she is a police officer.
>
> I'm not telling you to ignore the fact that a witness is a police officer. I'm not telling you to ignore every—any witness' background. Background can often help you understand where the person is coming from, what they mean, why they said what they did, why they saw what they did, whatever.
>
> So, background is important, but you don't by virtue of a person's background, be it a police officer or something else, treat the person as automatically more credible or automatically less credible. Background is a consideration, but all witnesses are to be treated the same. And if you give a person's background due weight, you're treating everyone the same.
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> I mean we all have different backgrounds, but treating our backgrounds as relevant is then treating us all the same.

Although the trial court's remarks about a person's "background" are arguably vague, in light of the court's express remarks cautioning the jury that a police officer is not entitled to "extra credibility," defendant has failed to show plain error affecting his substantial rights.[14] We further note that the trial court's references to "background" were not directed at a person's economic or social status.

IV. Assault With a Dangerous Weapon Charge

Defendant also argues that the trial court erred in submitting the assault with a dangerous weapon charge to the jury. This claim is moot because defendant was ultimately acquitted of this offense.[15]

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[13] *People v Bowman,* 254 Mich App 142, 148-151; 656 NW2d 835 (2002).

[14] *Carines, supra* at 763-764.

[15] See *People v Briseno*, 211 Mich App 11, 17; 535 NW2d 559 (1995).

V. Sentencing

Defendant next challenges his sentence of eighteen to fifty years' imprisonment for armed robbery as a third habitual offender. We find no error. Although defendant's sentence is within the recommended statutory sentencing guidelines range, he claims that it is disproportionate considering the circumstances surrounding the crime and his background. Because the instant offense was committed after January 1, 1999, MCL 769.34(10) requires this Court to affirm defendant's sentence in the absence of a scoring error or the use of inaccurate information.

To this end, defendant asserts that the trial court erroneously scored ten points for offense variable nineteen (OV 19). A trial court's scoring of a guidelines variable will be upheld on appeal if there is any supporting evidence.[16] Ten points is properly assessed under OV 19 if a defendant "interfered with or attempted to interfere with the administration of justice."[17] In this case, the trial court determined that ten points was appropriate because defendant gave a false name to the police. And a review of the record supports this finding. A detective with the police department testified that defendant provided him with a false name. Defendant also acknowledged giving the police false information on direct examination.

To the extent defendant argues that a person cannot interfere with the "administration of justice" until after an actual court arraignment, we disagree. This contention appears to be rooted in the theory that interference with the "administration of justice" refers only to conduct directly aimed at interfering directly with the courts. We consider it obvious that, despite their markedly different roles, both the courts and the police function as part of the overall criminal justice system. It is clear to this Court that the investigation of crimes is central to the administration of justice. We are not persuaded by defendant's claim that *People v Deline*[18] requires a different result. In *Deline,* we determined that the defendant was not interfering with the administration of justice when he simply switched positions in a car and refused a blood-alcohol test.[19] The present facts are distinguishable because defendant affirmatively lied to the police. For these reasons, we find that the trial court properly scored defendant ten points under OV 19.

Defendant's argument that the phrase "administration of justice" is unconstitutionally void for vagueness is likewise without merit. The constitutionality of a statute is a question of law that we review de novo. *People v Jensen (On Remand)*, 231 Mich App 439, 444; 586 NW2d 748 (1998). But as defendant failed to present this issue to the trial court, our review is for plain error affecting his substantial rights.[20] Because defendant makes no argument that the statute

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[16] *People v Hornsby,* 251 Mich App 462, 468; 650 NW2d 700 (2002).

[17] MCL 777.49. Although MCL 777.49 was amended after the incident underlying this case, the pertinent statutory language remained the same.

[18] *People v Deline,* 254 Mich App 595; 658 NW2d 164 (2002).

[19] *Id.* at 596-598.

[20] *Carines, supra* at 763-764.

implicates First Amendment freedoms, we review his challenge in light of the facts at issue.[21] In this context, a statute may be unconstitutionally vague if it: (1) does not provide fair notice of the conduct prescribed or (2) is so indefinite that it confers unstructured and unlimited discretion on the trier of fact to decide whether the law has been violated.[22] We believe that it is readily apparent that providing a false name to the police in the course of a criminal investigation would be understood by a reasonable person to be conduct that constitutes an attempt to interfere with the administration of justice.

For the reasons stated in *People v Hegwood*,[23] we also reject defendant's contention that MCL 769.34(10) is unconstitutional. As the Supreme Court in *Hegwood* explained, "the ultimate authority to provide for penalties for criminal offenses is constitutionally vested in the Legislature."[24] We further note that these guidelines merely limit the circumstances in which a defendant's sentence may be challenged and do not abolish the right to appeal. In light of this analysis, we find no substantive or procedural due process violation.

VI. Illegal Arrest

Defendant next argues that his arrest was not supported by probable cause and that any evidence gathered as a result should have been excluded at trial. Because defendant did not raise this issue below, our review is for plain error affecting his substantial rights.[25] Defendant claims that his statements to the police were improperly admitted. We find no error requiring reversal. These statements could have properly been used to impeach defendant's trial testimony regarding the nature of his wounds.[26] We further note that both the DeHaans were able to identify defendant at trial. On this record, defendant has failed to demonstrate plain error affecting his substantial rights.

VII. Ineffective Assistance of Counsel

Defendant ultimately contends that he is entitled to a new trial because of his trial counsel's failure to object to the errors raised on appeal. Because defendant did not move for a

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[21] *People v Beam,* 244 Mich App 103, 106; 624 NW2d 764 (2000).

[22] *Id.* at 105.

[23] *People v Hegwood*, 465 Mich 432, 436-440; 636 NW2d 127 (2001); see also Const 1963, art 4, § 45.

[24] *Hegwood, supra* at 436.

[25] *Carines, supra* at 763-764.

[26] See *United States v Havens*, 446 US 620, 627-628; 100 S Ct 1912; 64 L Ed 2d 559 (1980).

Ginther[27] hearing, our review is limited to the existing record.[28] An unpreserved constitutional error warrants reversal only when it is a plain error that affects a defendant's substantial rights.[29]

As previously held in this opinion, defendant has failed to show any error that affected his substantial rights. An ineffective assistance of counsel claim requires a defendant to show that his counsel's performance prejudiced him to the extent that but for counsel's error there was a reasonable probability that the result of the proceedings would have been different.[30] Defendant has not met this burden or overcome the presumption that his counsel's actions were sound trial strategy.[31]

VIII. Judgment of Sentence

Although not addressed by the parties, we conclude that this case should be remanded to the trial court to correct a plain clerical error in the judgment of sentence. The judgment of sentence states that defendant's sentences are to be served consecutively. But at the sentencing hearing, the trial court held that defendant's sentences for armed robbery and felon in possession of a firearm were to run concurrently, and that his felony-firearm sentence was to be served consecutively only to the armed robbery charge.[32] The judgment of sentence should be corrected to reflect the trial court's sentencing decision.

We affirm defendant's convictions but remand for correction of the clerical error in the judgment of sentence. We do not retain jurisdiction.

/s/ Jessica R. Cooper
/s/ E. Thomas Fitzgerald

I concur in result only.

/s/ Kirsten Frank Kelly

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[27] *People v Ginther,* 390 Mich 436; 212 NW2d 922 (1973).

[28] *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000).

[29] *Carines*, *supra* at 763-764.

[30] *People v Carbin*, 463 Mich 590, 600; 623 NW2d 884 (2001).

[31] See *id.* at 599-600; *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999).

[32] See *People v Lee*, 233 Mich App 403, 405; 592 NW2d 779 (1999).